UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PATRICIA WHITE, Plaintiff(s), v. COBLENTZ, PATCH AND BASS LLP LONG TERM DISABILITY INSURANCE PLAN, et al., Defendant(s).	No. C 10-1855 BZ **FINDINGS AND CONCLUSIONS**

While working as a legal secretary at Coblentz, Patch, Duffy & Bass LLP, plaintiff Patricia White participated in an ERISA welfare benefit plan (the "Plan") sponsored by Coblentz and insured by Prudential Insurance Company of America.[1] In this action, plaintiff claims that Prudential's denial of her long-term disability benefits was unlawful because she was

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[1] This Ruling constitutes the findings of fact and conclusions of law required by FRCP 52.

disabled under the "any occupation" standard of the Plan.[2]

I. BACKGROUND

Plaintiff's medical problems began in November 1999 when she stopped working at Coblentz due to pain in her hands, wrists, forearms, and elbows. Several months later, plaintiff returned to work on a part-time schedule, but her pain reemerged and she stopped working permanently. Plaintiff filed a claim for long-term disability benefits under the "own occupation" standard of the Plan. Prudential approved plaintiff's claim and she received benefits from March 2000 through April 2004. Prudential then terminated plaintiff's benefits as of May 2004 based on a medical evaluation it conducted. Plaintiff appealed this decision, but Prudential upheld its determination that she was no longer disabled.

In 2005, plaintiff filed a lawsuit in this court claiming that Prudential's termination of her benefits was improper. The Honorable Martin J. Jenkins first ruled that the appropriate standard of review was de novo review. After denying both parties' cross motions for summary judgment, Judge Jenkins conducted a short bench trial in March 2007. He analyzed plaintiff's medical history and the conflicting medical opinions regarding her condition, and concluded that plaintiff "has demonstrated that she is disabled under the terms of the Plan as to her 'own occupation' of legal

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[2] All parties have consented to my jurisdiction for all proceedings including entry of final judgment, pursuant to 28 U.S.C. § 636(c).

secretary and is entitled to LTD benefits from May 1, 2004 through [March 2005]." Administrative Record (AR) 508. Judge Jenkins did not reach the issue of whether plaintiff was disabled under the terms of the Plan as to "any occupation" which would allow her to receive benefits beyond March 2005.

After Judge Jenkins' decision, plaintiff filed a claim with Prudential to continue her benefits under the "any occupation" standard. Prudential denied this claim in May 2008 and also denied plaintiff's subsequent appeals. In April 2010, plaintiff filed this lawsuit alleging that Prudential's decision to deny her benefits under the "any occupation" standard was unlawful under ERISA.

II. ANALYSIS

A challenge to the denial of benefits under an ERISA plan is reviewed de novo "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). Here, both parties agree that de novo review applies. Under this standard, the court "does not give deference to the claim administrator's decision, but rather determines in the first instance if the claimant has adequately established that he or she is disabled under the terms of the plan." Muniz v. Amec Const. Mgmt., Inc., 623 F.3d 1290, 1295-96 (9th Cir. 2010). Generally, the court's review is limited to the evidence contained in the administrative record and extrinsic evidence can only be

considered under certain limited circumstances. Opeta v. Northwest Airlines Pension Plan for Contract Employees, 484 F.3d 1211, 1217 (9th Cir. 2007).

Accordingly, to prevail in this action, plaintiff must establish that she was disabled under the "any occupation" standard of the Plan. The Plan provides that a claimant is disabled when due to sickness or accidental injury she is (1) not able to perform for wage or profit the material and substantial duties of any job for which she is reasonably fitted by her education, training or experience; (2) not working at any job for wage or profit; and (3) under the regular care of a doctor. AR 1203. While the Court reviews the entire administrative record in determining whether plaintiff was disabled, the parties agree that the relevant time period on which the Court should focus, is from March 3, 2005 (when plaintiff became eligible for benefits under the "any occupation" standard) to May 22, 2008 (when Prudential first denied plaintiff's claim for benefits under that standard). See Docket No. 83 at 10-13.

A threshold issue is the extent to which Judge Jenkins' previous findings and conclusions apply to this lawsuit. Prudential is correct that I cannot automatically rule that plaintiff is disabled based on Judge Jenkins' earlier decision because the current dispute is for a different time period and requires a determination under the "any occupation" standard rather than the "own occupation" standard. But this does not mean that Judge Jenkins' decision is immaterial. Judge Jenkins ruled after thoroughly

reviewing plaintiff's medical condition and functional capacity from 1999 to 2005 and neither party appealed from his ruling. Because many of the issues present here have already been litigated by the parties, there is no reason for me to revisit those issues. Rather, Judge Jenkins' findings and conclusions as they relate to the "own occupation" standard, become the starting point for my analysis. Thus, as of March 2005, it is established that plaintiff had a repetitive stress injury in her upper extremities that limited her functional capacity and prevented her from working as a legal secretary. The questions now before the Court are whether after March 2005 plaintiff's medical condition changed and whether she could work in any occupation with her condition.

In support of her claim, plaintiff submitted medical documentation to Prudential that she argues shows that her functional capacity remained limited after 2005 and prevented her from working in any occupation. One medical report is from Dr. Dickie Hill, a licensed osteopathic physician and surgeon, whom plaintiff consulted on several occasions in December 2009 and January 2010. After examining plaintiff and reviewing her medical records, Dr. Hill explained that plaintiff's soft tissue pain has remained chronic and "exceed[s] the ability of her body to recover" from such pain. AR 381. Dr. Hill concluded that because plaintiff's soft

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tissue problems could flare up and cause excruciating pain with just the limited use of her upper extremities, she was disabled from working in any occupation. Id.[3]

Additionally, plaintiff consulted with Dr. Mohinder Nijjar in December 2009. Dr. Nijjar, a board certified orthopedic surgeon, reviewed plaintiff's medical history and physically examined her. While Dr. Nijjar was definitive about plaintiff's condition having not changed since 2005, his other conclusions are ambiguous. It is not clear whether his medical opinion is that plaintiff is unable to work only in her "own occupation" or in "any occupation." See AR 400-401. At one point in Dr. Nijjar's report, he agrees with earlier opinions that plaintiff is unable to work as a secretary and lists reasons why she cannot work in this capacity. Id. But in his list of reasons, Dr. Nijjar writes that (1) plaintiff experiences moderate pain after 30 to 45 minutes of sitting, walking, or standing; (2) "there is no

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[3] Prudential objects to the admission of Dr. Hill's report, arguing that his medical practice focuses mainly on cosmetic procedures and there "is no evidence that he has any particular background or experience treating repetitive stress disorders, fibromyalgia, or arthritis." Docket No. 39 at 10. In the Ninth Circuit, evidence outside of the administrative record may be considered in limited circumstances, such as when issues arise about the credibility of medical experts. See Opeta, 484 F.3d at 1217. Because Prudential has raised such an issue, the Court finds that it is necessary to consider Dr. Hill's supplemental declaration which explains his medical background. In this declaration, Dr. Hill testifies that he is the primary care physician for almost 1200 active patients and he spends less than 1 percent of his time performing cosmetic procedures. Docket No. 43 at ¶ 12. Further, he testifies that he has treated hundreds of patients with repetitive stress disorders and fibromyalgia. Id. Based on this testimony, Prudential's objections with respect to Dr. Hill's report are **OVERRULED**.

job provided" where she would only be required to work for 30 to 45 minutes at a time; and (3) plaintiff "needs to use both upper extremities for most of the work required, and without that consideration, I think the patient is unable to be fully employed with the condition of her neck and upper extremities." Id.

Plaintiff also relies on Dr. Alan Zacharia's June 2006 declaration. Of the various medical reports in the record, I found his the most helpful. Dr. Zacharia was the jointly appointed orthopedic evaluator who examined plaintiff in 2001 for her worker's compensation claim. In 2001, he concluded that plaintiff was a medically qualified injured worker due to the repetitive stress injury in her upper extremities and recommended that she rest until her injury became asymptomatic. AR 709-10. Dr. Zacharia noted that it is rare for such stress injuries to "persist longer than three to five years because people, over an extended period of time, develop protective self-modification protocols and learn to avoid the kinds of activities that exacerbate the condition." AR 710. Dr. Zacharia's 2006 declaration further clarified his medical opinion, explaining that while most patients adapt to their condition and are able to return to work, "there are a significant number who cannot return to work" and plaintiff's ability to work will depend on the frequency and intensity of her flare-ups and whether or not there are limitations. Docket No. 28-3 at ¶ 15.[4] Dr. Zacharia's

[4] Prudential objects to Dr. Zacharia's 2006 declaration because it is not in the administrative record and his 2001 report, when he actually examined plaintiff, is more reliable.

declaration also reiterated his clinical findings which showed through x-rays that plaintiff had problems associated with degenerative changes in her cervical anatomy and with arthritic bone spurs on her cervical vertebrae (called "foraminal impingement"). He noted that these problems are likely to worsen with age, and that when combined with repetitive motions, such as during work, they cause pain in her extremities. Id. at ¶¶ 4-7.

Plaintiff's medical documentation included medical notes from her doctor visits in Italy (where she moved in 2005) and her 2010 letter to Prudential outlining her medical condition and functional capacity. Plaintiff's records from Italy show that she did not receive consistent treatment from doctors with respect to her arm pain, but she did consult Italian medical professionals occasionally in 2006 and 2007 and sometimes complained about pain in her upper extremities during these consultations. See AR 511-539. In her letter to Prudential, Plaintiff explains that her activity level remains minimal due to the constant pain she is experiencing. AR 388. Her biggest concern is that even the slightest activity, especially with her arms, may cause a flare-up that would once again result in excruciating pain and swelling which may take weeks or months to recover from. Id.

This objection is **OVERRULED**. Regardless of whether it was plaintiff's or Prudential's fault for the declaration not being included in the administrative record, Prudential was aware of about the declaration and Dr. Zacharia's explanatory testimony because the declaration was filed (though not considered) in the earlier action before Judge Jenkins.

Plaintiff contends that it is this pain and these concerns that prevent her from working in any job. Id.

Having reviewed the record, I find that plaintiff has shown that her medical condition has not improved since 2005 as she still suffers from a repetitive stress injury to her upper extremities. Although plaintiff is at times able to use her arms, this limited activity may later result in flare-ups that cause her debilitating pain, such as the time in 2000 when her return to work resulted in six months of intensive treatment. The record also contains evidence that her condition prevents her from working in any occupation.

Prudential's arguments against plaintiff's showing are not persuasive. It first relies on the medical reports of two doctors it hired to review plaintiff's file. Both reports fail to provide a comprehensive review of plaintiff's medical condition because they do not address the issues and concerns raised by plaintiff's doctors. Though this was one of the reasons Judge Jenkins ruled in favor of plaintiff in the earlier action, Prudential continues to employ the same practice. See e.g., AR 507 at ¶ 73. ("Dr. Stevens [Prudential's medical reviewer] never acknowledges or reconciles several key pieces of evidence with his opinion that Plaintiff can perform certain activities. Specifically, Dr. Stevens never acknowledges Plaintiff's attempt to return to work for twenty hours per week and the resulting flare-up and six months of intensive treatment...").

After Prudential received Dr. Hill's and Dr. Nijjar's reports, it hired Dr. Ephraim Brenman to conduct a medical

review of plaintiff's file. Rather than addressing plaintiff's doctors' concerns about her medical condition, Dr. Brenman simply concluded that plaintiff's claim was baseless because it consisted of mainly self-reported complaints without any clinical findings to support them. AR 376-77. Dr. Brenman found that the "claimant has no restrictions or limitations in terms of the ability to sit, stand, walk, reach, lift, carry, and perform repetitive upper extremity activities". AR 377. Dr. Brenman did not attempt to explain why Dr. Hill or Dr. Nijjar's conflicting conclusions, that plaintiff could not perform these activities, were wrong. Even more troubling, Dr. Brenman did not acknowledge that Judge Jenkins specifically ruled that plaintiff had a limited functional capacity in 2005. Judge Jenkins' decision was based on previous functional capacity examinations that found plaintiff did have physical restrictions, such as her being unable to type for longer than ten minutes. AR 507; see also AR 878-89 (after conducting a physical examination, Dr. Chu concluded that plaintiff suffers from repetitive stress injury and may have difficulty reaching in all directions and with gross and fine manipulation). Nor did Dr. Brenman acknowledge that previous examiners had noted that plaintiff's extremities were swollen which is objective evidence that she did have some form of stress injury. See, e.g., AR 712 (Dr. William Billings, plaintiff's former treating physician, remarked that on February 28, 2005 he observed plaintiff "with very significant pain, swelling, and warmth of the upper one half

of both forearms"); AR 565 (Dr. Billings reported in May 2004 that he has treated plaintiff actively since 2000 for bilateral upper extremity pain, swelling, muscle firmness, and dysfunction); Zacharia Declaration at Docket No. 28-3. I attach little weight to Dr. Brenman's report, since it ignores these findings and conclusions.

The same is true for Dr. Trenton Gause's 2008 medical review of plaintiff's file. Dr. Gause concluded that while plaintiff has a mild impairment that is not likely to improve, she "can use her hands for reaching, grasping, gripping, holding, punching, and seizing in an unrestricted fashion." AR 472-73. Dr. Gause made no attempt to explain why other doctors determined that plaintiff had a limited functional capacity and never addressed Judge Jenkins holding that she could not work as a legal secretary because she could not perform these very activities (i.e. reaching, grasping, gripping, etc.).[5]

Prudential also fails to support its position that "clinical findings" such as "functional examination findings" are necessary for plaintiff to prevail on her claim. See AR 377. Prudential does not point to any language in the Plan, which governs the agreement between plaintiff and Prudential, that requires such "clinical findings." Courts in this District have previously held that insurer defendants in

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[5] Dr. Brenman only charged Prudential $1,023.75 for his entire review of plaintiff's medical file and a number of litigation records. AR 363. Dr. Gause's review only cost Prudential $1,155.00. AR 463. Considering that plaintiff's file consisted of about 10 years' worth of documents, these low charges suggest that the reviews may have been less than thorough.

ERISA actions cannot deny claims based on standards that are not contained in the policy. See e.g., Duncan v. Continental Casualty Co., 1997 WL 88374 at *4 (N.D. Cal. 1997)(holding that the defendant insurer could not exclude plaintiff's ERISA claim for lack of objective medical evidence unless that standard was clearly articulated in the policy). Moreover, as highlighted earlier, there were clinical findings in 2004 and 2005 and there is no indication that plaintiff's condition has drastically changed to the point that such findings are now irrelevant.

Prudential criticizes plaintiff's medical evidence, claiming that the only clinical findings are the swellings observed by several doctors. Prudential does not deny these findings and does not explain why it did not conduct its own physical examination of plaintiff. Under the Plan, Prudential has specifically reserved the right to physically examine plaintiff "as often as is reasonable." AR 1214. Notably, when evaluating plaintiff's "own occupation" claim, Prudential required plaintiff to submit to physical examinations, including a functional capacity examination. If Prudential believed that plaintiff's subjective complaints after March 2005 were false, it could have again required her to submit to such procedures. Instead, Prudential chose to overlook plaintiff's complaints and her doctor's observations and now argues that plaintiff's claims are not supported by "functional findings."

The reality in this case is that plaintiff's medical condition is interrelated to her subjective complaints of

pain, which is not grounds for rejecting her claim. In Saffon v. Wells Fargo & Company Long Term Disability Plan, the Ninth Circuit discussed the relevance of subjective pain by referring to its previous opinions on the topic in Social Security disability cases. 522 F.3d 863, 872-73 (9th Cir. 2008)(noting that "individual reactions to pain are subjective and not easily determined by reference to objective measurements"); see also Patrick v. Hewlett-Packard Co. Emp. Benefits Org. Income Protection Plan, 638 F.Supp.2d 1195, 1215 (S.D. Cal. 2009)(ERISA insurer's approach of "disregarding subjective evidence of pain is disapproved in Ninth Circuit precedent")(internal citations and quotations omitted). In the Social Security context, the claimant's "pain need not be corroborated by objective medical findings, but some impairment must be medically ascertained." See e.g., Bunnell v. Sullivan, 947 F.2d 341, 347-48 (9th Cir. 1991). That is the case here. Plaintiff has had multiple doctors, such as Dr. Zacharia, Dr. Billings, Dr. Chu, Dr. Nijjar, and Dr. Hill, explain to Prudential that she suffers from a repetitive stress injury to her upper extremities. Thus, an "impairment [has been] medically ascertained" by medical professionals and the concern that plaintiff does not suffer from any medical problem is negated. There is no further requirement that plaintiff's subjective pain be corroborated by objective evidence.

Prudential's other arguments similarly miss the mark. While Prudential is correct that the Plan requires plaintiff to be under the regular care of a doctor, this does not lead

to the denial of plaintiff's benefits. Plaintiff followed Dr. Zacharia's medical advice that the most important part of her treatment was to rest until her symptoms went away. In any event, plaintiff still consulted with doctors periodically between 2005 and 2008, even while she was in Italy.

To counter plaintiff's assertion that she cannot work in any occupation, Prudential points to the vocational assessment performed by its vocational rehabilitation specialist in May 2008. Prudential's specialist concluded that plaintiff may work in various sedentary positions, such as the occupation of legal secretary. AR 1038-39. But this assessment is not persuasive as it is based on Dr. Gause's conclusion that plaintiff does not have any physical restrictions besides not being able to carry more than 20 pounds. AR 1038. The assessment also does not address Judge Jenkins' earlier ruling that plaintiff could not work as a legal secretary.[6]

Based on this record, I find that plaintiff's medical condition did not materially change after Judge Jenkins' ruling. Plaintiff's repetitive stress injury causes her severe pain in her extremities, and, of equal importance, she

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[6] The only other vocational assessment conducted after March 2005 was performed by the Social Security Administration (SSA) in May 2005. While the plaintiff urges the Court to adopt the SSA's finding of disability, the Court may only use it as evidence in a de novo review. The SSA decision is based on a different disability standard and concentrated on plaintiff's degenerative disc disease and not her repetitive stress injury. The Court, however, takes into account the SSA's conclusion that plaintiff could not meet the demands of basic work related activities on a sustained basis. AR 769.

faces the significant danger that limited activity may cause her symptoms to flare-up and force her to deal with even more debilitating pain. Due to this medical condition, I find that she could not work in any occupation for which she was reasonably fitted by her education, training or experience and conclude that plaintiff's termination decision was unlawful.

The last issue concerns plaintiff's separate claim for prejudgment interest at a rate of ten percent pursuant to California Insurance Code § 10111.2. Defendant argues that plaintiff's Section 10111.2 claim is preempted by ERISA, while plaintiff counters that it falls under the ERISA savings clause, 29 U.S.C. § 1144(b)(2)(A). Plaintiff, however, concedes that this District has previously addressed this issue and ruled that Section 10111.2 is preempted by ERISA. See, e.g., Turnispeed v. Educ. Mgmt. LLC's Emp. Disability Plan, 2010 WL 140384 at *4 (N.D. Cal. 2010)("In sum, allowing plaintiff to proceed with a state law claim under Section 10111.2 would effectively impose a mandatory prejudgment interest rate of 10% on successful ERISA claims, expanding the scope of ERISA damages and supplementing the ERISA enforcement remedy. Therefore, the claim is preempted by [ERISA]"); Minton v. Deloitte & Touche USA LLP Plan, 631 F.Supp.2d 1213, 1220 (N.D. Cal. 2009). I agree with these decisions and it is immaterial that plaintiff's Section 10111.2 claim was separately pled. Thus, plaintiff's Section 10111.2 claim is preempted by ERISA.

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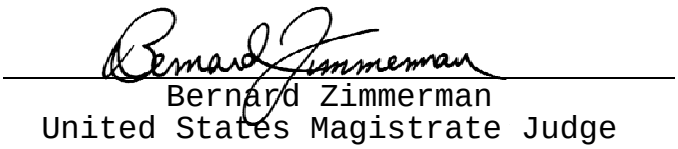
III. CONCLUSION

For the foregoing reasons, I conclude that plaintiff is disabled under the terms of the Plan as to "any occupation."[7] As requested by plaintiff, the parties are **ORDERED** to meet and confer about the remaining issues in this matter, such as the amount of benefits owed and the appropriate rate of interest to be applied under ERISA. The parties shall file a joint proposal for a judgment consistent with this Order by **July 20, 2011**. If the parties are unable to reach a complete agreement after meeting and conferring, they may file separate proposals regarding the issues still in dispute.

Dated: June 24, 2011



Bernard Zimmerman
United States Magistrate Judge

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[7] As explained earlier, defendant's objections to Dr. Hill's declaration and Dr. Zacharia's declaration are **OVERRULED**. To the extent that either party objects to other submitted evidence that was not contained within the administrative record, those objections are **GRANTED**. The Court finds that such unnecessary evidence does not fall within the limited circumstances outlined by the Ninth Circuit in which evidence outside the administrative record may be considered in a de novo review. See Opeta, 484 F.3d at 1217.